REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 306 of 2008
1. SAMUEL MWANGI
2. JOHN NDUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Sergon & Njagi, JJ) dated 27th October, 2008

in

H.C.CR. A NO. 49 of 2005)
****

JUDGMENT OF THE COURT

The two appellants SAMUEL MWANGI, the 1st appellant and JOHN NDUNGU, the 2nd appellant, were each convicted on one count of robbery with violence contrary to section 296(2) of the Penal Code and on one count of being in possession of Narcotic Drugs contrary to section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act Number 4 of 1994. Each appellant was sentenced to suffer death in the robbery charge and ordered to pay a fine of Shs. 9,500/- on the drugs offences. Their first appeals to the High Court of Kenya at Mombasa were dismissed on 27th October 2008 by Sergon and Njagi JJ and hence this second and final appeal.

The facts which the trial court and the first appellate court found proved may briefly be stated as follows: On 27th September 2004 at about 9.00 a.m. Musa Haji (PW1) a salesman with Taita/Taveta Distributors went to sell assorted cigarettes in Voi, Karioko, Tanzania, Kasarani and Mlegwa trading centres of Taita Taveta District. He was on a motor cycle registration No KAL 751H. On the way to Voi he reached some sandy section of the road on Gimba stretch whereupon he met a man wearing a pinkish mask and holding a metal bar. Without uttering a word that man hit PW1 on the helmet with the metal bar. PW1 lost control of the motor cycle and fell down. The stranger hit him once again before two men emerged from a nearby bush. The three attackers then held and pulled PW1 twenty (20) metres into the bush where they knocked off his helmet. They continued hitting him and left him bleeding profusely. During the attack the assailants emptied PW1's pockets of all the money he had. They continued demanding more money and they tried to stab him on the throat but PW1 managed to disengage himself and ran away.

PW1 testified that he saw the 1st appellant produce a knife with which he wanted to kill him. He

said that the 1st appellant wore rastas and was one of the persons he had seen emerge from the bushes. PW1 further testified that the 2nd appellant held him by the hands and knees and that is when PW1 saw his face. Upon escaping from his assailants PW1 ran to the road and he stopped a canter lorry. He narrated his ordeal to the driver of the canter and he asked him to take him to the scene where he had left the motor bike. Later PW1 was taken to Voi District Hospital where he was admitted for 1½ weeks. He lost Kshs. 92,272/- in the robbery.

Two hours later at about 10.15 a.m. Clemence Mkambui (PW2), a villager who lived near Mlegwa road, was going to her shamba when she met three men walking leisurely on the sandy stretch of the road. The three men were strangers in the area and were openly smoking bhang. They had rastas. Their attire and the way they swaggered terrified PW2. PW2 ran and alerted PW3 and other villagers and told them about the three strangers who were within their village. The villagers gathered and when the three strangers saw them they ran away into a nearby bush. The villagers, among them Christopher Mwachofi (Pw3) and Moses Fondo (PW4) gave chase and mobilized the youth to comb the bush for the strangers. From the bush two appellants were flushed out and they were subsequently handed over to PC Nyawa (PW7) and PC Musembi (PW8) who had joined in the search. On being searched the two appellants had a knife and several rolls of bhang. At the scene of their arrest the police officers recovered a helmet, an iron bar and face masks.

On 6th October 2004 the appellants were arraigned before the Senior Resident Magistrate at Voi to answer the charges laid against them which we have already set out earlier in this judgment.

The appellants in their defence before the court admitted having been arrested by villagers and police officers at the time and the place stated by PW2, PW3 and PW4, but, averred that they were genuine businessmen who had gone to that village to buy charcoal, bananas and tomatoes. They denied having robbed anybody and alleged that they were arrested in that village because they were strangers and because they belonged to a different tribe.

The two courts below rejected the appellants' defence and made concurrent findings upon which the appellants were convicted. It was their findings; first, that the robbery took place in broad day light and the appellants were identified by PW1, PW2, PW3 and PW4; secondly, that the appellants were flushed out of the bush from where they were hiding; thirdly, that they were found in possession of the complainants (PW1's) property; and fourthly, they wore distinctive hair styles, and all the appellants were easily recognizable; and that they led the police and the villagers to where they had attacked and robbed PW1. These findings, of course, were corroborative of each other.

The appellants now appeal to this Court against their said convictions and sentences on two main principal grounds which were argued before us by their learned counsel, Mr. Okoth – Odera. He submitted that the two courts below did not carefully consider and re-evaluate the evidence on record as regards the purported identification of the appellants and that had they done so they would have found that the appellants were not positively identified. He further argued that the appellants were convicted on a mere dock identification and that the failure to hold an identification parade was fatal to the prosecution case. Mr Okoth Odera faulted the first appellate court for a purported failure to re-evaluate the evidence on record.

Mr Ondari, the learned Assistant Director of Public Prosecutions supported the convictions. He contended that the appellants were positively identified by the witnesses PW1, PW2, PW3 and PW4 and that since they were arrested at the scene there was no need for an identification parade.

As stated earlier, there were concurrent findings by the two courts below that the appellants were identified by PW1 to PW 4. The superior court stated:-

"The evidence of Clemence Mkamburi (PW2), Christopher Mwachofi (PW3) and Moses Ngimbe Fondo (PW4) put the appellants at the scene of crime. (PW3) and (PW4) were among the villagers who gave a chase and managed to arrest the appellants when they were seen fleeing. (PW2) had told (PW3) about the appellants' presence within the area. PW3 sought the assistance of (PW4) and other villagers to pursue the robbers. They were arrested and handed over to the Police. The appellants led by PC Maurice Nyawa (PW7) and PC Peter Musembi (PW8) to the scene of crime where the complainant was attacked and robbed. We are satisfied that the appellants were placed at the scene of crime. The mask worn by the 1st appellant was recovered at the scene. The evidence also established that the appellants were found in possession of substances which were later examined and proved to be cannabis sativa."

By learned counsel for the appellants submitting that the appellants were not conclusively identified as

the robbers and that there was a possibility of mistaken identity, the appellants are in effect asking this Court to depart from concurrent findings of facts by the two lower courts. In that regard, we would reiterate what we said in Nyeri in Criminal Appeal No.131 of 2002: Daniel Kabiru Thiongo v Republic (unreported) that an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such finding, or in other words, the findings were perverse and therefore bad in law. If authority was imperative for such a fundamental principle of criminal procedural jurisprudence, we would refer to what this Court had earlier posited in Stephen Muriungi & Another v Republic [1982-88] 1 KAR 360. In delivering the majority judgment, Chesoni, Ag JA. (as he then was) said at page 366:-

"We would agree with the view expressed in the English case of Martin v Glywed Distributors Ltd (t/a MBS fastenings) [1983] ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

In the appeal now before us, this Court is exercising the jurisdiction of a second appellate court from a decision of the subordinate court and by dint of the provisions of section 361(1) of the Criminal Procedure Code we are confined to matters of law only. Bearing in mind the principles we have elucidated above, we are far from being persuaded that the findings of both the trial and the first appellate court on the appellant' involvement in the robbery could not reasonably have been arrived at on the basis of the evidence on record. On the contrary, we are of the view that the evidence of the complainant PW1, PW2, PW3 and PW4 whose evidence we have outlined hereinbefore, and which was believed by the trial court, squarely proves that the appellants were not innocent traders or passersby who were the victims of mistaken identity, but, were daring bhang smoking robbers who were caught red handed and also in broad day light received a dose of mob injustice. There was no possibility of mistaken identification.
On our own independent assessment of the entire evidence on record, we find that the appellants were properly convicted and that the convictions are safe. We uphold them.

We reject the appeals which we hereby order that they be and are hereby dismissed.

Dated and delivered at Mombasa this 12th day of March 2010.
P. K. TUNOI
.....
JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

I certify that this is
a true copy of the original

DEPUTY REGISTRAR